89- 1474 (1)

No. _____

In The

Supreme Court of the United States

October Term, 1989

McDERMOTT INTERNATIONAL, INC.

Petitioner,

versus

JON C. WILANDER

Respondent.

On Petition For Writ Of Certiorari To The U.S. Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI OF McDERMOTT INTERNATIONAL, INC.

JAMES B. DOYLE
VOORHIES & LABBE'
P.O. Box 3527
Lafayette, LA 70502
Telephone: (318) 232-9700

Attorney for Petitioner, McDermott International, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

45

QUESTIONS PRESENTED FOR REVIEW

I.

When a worker is injured on a fixed platform in the Persian Gulf, but claims status as a seaman under the Jones Act, 46 U.S.C. 688, by alleging connection to an American-flagged vessel, how is the United States District Court to determine which of the conflicting definitions of status constitutes American law, specifically, whether transportation-related employment functions are a pre-requisite to status under the Act?

II.

Did the United States Court of Appeal, Fifth Circuit, err as a matter of law, in concluding Respondent, who had only a transitory connection with the only American vessel in an operating group of vessels, had established sufficient connexity with that vessel to impose American Law on a cause of action arising from Respondent's work as a painter foreman on an offshore platform in the Persian Gulf?

LIST OF PARTIES

The following are the parties to this proceeding:

Jon C. Wilander
Plaintiff-Respondent

McDermott International, Inc.
Defendant-Petitioner

J. B. Jones, Jr., Jennifer Jones Bercier,
and Michael Bercier of the law firm of
Jones, Jones & Alexander, P. O. Drawer M,
Cameron, Louisiana 70631
Attorneys for Plaintiff-Respondent

James B. Doyle of the law firm of
Voorhies & Labbé, P. O. Box 3527,
Lafayette, Louisiana 70502
Attorney for Defendant-Petitioner

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
DECISIONS BELOW	1
JURISDICTION	1
STATUTE PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
ARGUMENT	5
Background	7
Current Fifth Circuit Cases	10
The Law of Other Circuits	13
CONCLUSION	14
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986) ..... *passim*

Buna v. Pacific Far East Line, Inc., 441 F.Supp. 1360 (N.D. Cal. 1977) 14

Chick Kam Choo v. Exxon Corporation, 108 S.Ct. 1684 (1988) 15

Director, OWCP v. Perini North River Associates, et al, 103 S.Ct. 634, 459 U.S. 297, 74 L.Ed.2d 465 (1983) 16

Gahagan Construction Corporation v. Aramao, 165 F.2d 301 (1st Cir. 1948) 9

Gianfala v. Texas Company, 357 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1958) 8, 9

Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970) 6

International Oilfield Divers, Inc., et al v. Lonnie Pickle, et al, 791 F.2d 1237, 795 F.2d 1009 (5th Cir. 1986) cert. den. 479 U.S. 1059, 107 S.Ct. 939 (1987) 5

Johnson v. John F. Beasley Construction Company, 742 F.2d 1054 (7th Cir. 1984) 5, 11

Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) 6

LeGros v. Panther Services Group, Inc., 863 F.2d 345 (5th Cir. 1988) 10, 11, 12

TABLE OF AUTHORITIES – Continued

Page

Lormand v. Aries Marine Corporation, et al, 820 F.2d 1222 (5th Cir. 1987), cert. den. 484 U.S. 1031, 108 S.Ct. 739, 98 L.Ed.2d 774 (1988) 5

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 905 S.Ct. 1772, 26 L.Ed.2d 339 (1970) 15

New v. Associated Painting Services, Inc., 863 F.2d 1205 (5th Cir. 1989) 10

Nolan v. Coating Specialities, Inc. 422 F.2d 377 (1970) 10

Norton v. Warner Co., 321 U.S. 565, 64 S.Ct. 747 (1944) 8

Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959) ..... *passim*

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986) 15

Peterson v. Chesapeake & Ohio Railway Company, 784 F.2d 732 (6th Cir. 1986) 13

Pizzitolo v. Electro-Coal Transfer, 812 F.2d 977 (5th Cir. 1987), cert. den. 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988) 10, 11, 12

Salgado v. M. J. Rudolph Corporation, 514 F.2d 750 (1975) 13

Schexnider v. McDermott International, Inc., 817 F.2d 1159, 824 F.2d 972 (5th Cir. 1987), cert. den. 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987) [affirmed other grounds, 868 F.2d 717 (5th Cir. 1989), cert. den. 110 S.Ct. 150, 107 L.Ed.2d 108 (1989)] 6

TABLE OF AUTHORITIES – Continued

Page

Senko v. LaCrosse Dredging Corporation, 352 U.S. 370, 77 S.Ct. 415 ..... 8, 9

Simko v. C&C Marine Maintenance Company, 594 F.2d 960 (3rd Cir. 1979) 5, 12

Slatten v. Martin Keeby Construction Company, Inc., 506 F.2d 505 (1974) 13

South Chicago Coal & Dock Company v. Bassett, 104 F.2d 522 (7th Cir. 1939), 309 U.S. 251, 60 S.Ct. 544 (1940) 7, 8

Southern Pacific Company v. Jensen, 244 U.S. 205, 37 S.Ct. 524 (1916) 15

Summerlin v. Massman Construction Company, 199 F.2d 715 (4th Cir. 1952) 8

Whittington v. Sewer Construction Company, Inc., 541 F.2d 427 (1976) 13

Wilkes v. Mississippi River Sand & Gravel Company, 202 F.2d 383 (6th Cir. 1953) 8

Worthington v. Icicle Seafoods, Inc., 774 F.2d 349 (9th Cir. 1984) 14

STATUTES

28 U.S.C. 1254(1) 1

28 U.S.C. 2101(c) 1

33 U.S.C. 901, et seq. 7

33 U.S.C. 903(b)(3) 7, 11

TABLE OF AUTHORITIES – Continued

Page

46 U.S.C. 688 2

46 U.S.C. 688(a) 2

OTHER AUTHORITIES

Schoenbaum, Admiralty and Maritime Law (1987) .. 10, 14

DECISIONS BELOW

The decision of the United States Court of Appeal, Fifth Circuit, is reported at 887 F.2d 88 (5th Cir. 1989).

Unreported decisions of the District Court bearing on this issue, including the Court's ruling on Relator's Motion for Judgment on Findings of the Jury; and on Relator's Motion for Judgment N.O.V. are reproduced in the appendix.

JURISDICTION

This Petition seeks review of the judgment of the United States Court of Appeal, Fifth Circuit, entered on the 30th of October, 1989. After its entry, both sides petitioned for rehearing and/or rehearing *en banc*. On the 16th of January, 1990, the Court of Appeal denied Relator's Petition for Rehearing and issued its mandate. On the 31st of January, 1990, Relator petitioned the Court of Appeal for a recall and stay of mandate, pending filing in this Court. The Court of Appeal denied Relator's Petition on the 26th of February, 1990.

This Petition is filed timely pursuant to 28 U.S.C. 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE PRESENTED FOR REVIEW

The Jones Act, 46 U.S.C. 688(a):

(a) Application of Railway Employee Statutes; Jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Jon Wilander, a resident of the State of Louisiana, brought suit on August 2, 1984, against McDermott International, Inc., at that time a Panamanian corporation with its principal place of business in Brussels, Belgium, seeking damages under the Merchant Marine Act, 46 U.S.C. 688, and the General Maritime Law, and invoking the maritime jurisdiction of the United States District Court for the Western District of Louisiana.

In his original Complaint, although alleging status as a seaman, Wilander claimed attachment to no particular

vessel. Wilander had worked as a paint foreman offshore in the Persian Gulf. His company had a contract with the Qatar General Petroleum Corporation (QGPC), which owned various platforms in a production field offshore Qatar.

Wilander's employment required him to supervise a crew of workmen, primarily Filipinos. His work consisted of sandblasting, and then painting, various fixtures and piping located on the fixed platforms.

When Wilander was on a particular job assignment which required him to remain offshore overnight, he slept, ate, and planned his job activities aboard the McDermott Derrick Barge *DB-9*, a Panamanian-flagged vessel owned by McDermott International, Inc. Wilander was given the use of the M/V *GATES TIDE*, an American-flagged crew boat outfitted for use on this job as a "paint boat," for five days of the total 15 months he spent on the job. The *GATES TIDE*, owned by Tidex International, Inc. (no relation to McDermott), was loaded with sand pots, an air compressor, a backhoe, and various other pieces of equipment used by Wilander's crew. The *GATES TIDE* was also used to transport Wilander and his men throughout the production field for the purpose of taking inventory on the storage barges; transporting the crew to and from the *DB-9;* and, when it was tied up, to serve as Wilander's primary support station while his crew was on the platform performing the manual labor connected with their activities. Wilander's job was supervisory. He would assign work duties and check the work when it was done.

The *GATES TIDE* was time-chartered to McDermott International, Inc. It first came on this job on the 29th of

June, 1983, five days before Wilander's accident. During that time, Wilander was assigned no navigational duties aboard the *GATES TIDE*, which functioned as his support ship.

Wilander was injured when he was asked to inspect a pipe on the third level of a fixed platform to determine if it was leaking. In the course of performing this task, a 3/8-inch bolt serving as a plug in the pipeline blew out under pressure, striking Wilander in the head.

The trial in the district court was bifurcated, with the jury first deciding issues relating to seaman status. Given a choice of four possibilities (the fixed platform, the Panamanian-flagged *DB-9*, the American-flagged *GATES TIDE*, and an unidentified group of vessels known as the "Tidex fleet"), the jury chose all four, finding Wilander was connected to all by virtue of his employment.

Only Wilander's connection with the *GATES TIDE* put him arguably within the scope of coverage of the Jones Act. Thus, that connection was examined extensively by motions to the court and was the focus of much argument in the Fifth Circuit.

The Fifth Circuit concluded its test of substantiality voiced in *Barrett v. Chevron USA, Inc., infra*, applied as "American Law." Then, it concluded Wilander had presented "sufficient evidence to support the jury's finding" on status, but he would not meet the transportation function requirement of other Circuits. The judgment of the trial court on status was affirmed and made final, while issues of liability and damages were remanded for trial on unrelated grounds.

It is to that decision this Petition is directed.

ARGUMENT

In the last three years, this Court has twice denied petitions for review by writ of certiorari involving Jones Act status questions, with two justices dissenting. *Lormand v. Aries Marine Corporation, et al*, 820 F.2d 1222 (5th Cir. 1987) cert. den. 484 U.S. 1031, 108 S.Ct. 739, 98 L.Ed.2d 774 (1988); *International Oilfield Divers, Inc., et al. v. Lonnie Pickle, et al.*, 791 F.2d 1237, 795 F.2d 1009 (5th Cir. 1986) cert. den. 479 U.S. 1059, 107 S.Ct. 939 (1987). Each petition came from the Fifth Circuit, which applies a test for status which does not take into account activities related to the transportation function of the vessel, i.e., those related to the navigation of the vessel as a means of transport over water rather than its "special mission." Other Circuits use aid to navigation as a determining factor.

The two transportation/navigation cases most frequently cited are *Johnson v. John F. Beasley Construction Company*, 742 F.2d 1054 (7th Cir. 1984); and *Simko v. C&C Marine Maintenance Company*, 594 F.2d 960 (3rd Cir. 1979). The non-transportation cases are *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), and the *en banc* decision *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986).

The split among the Circuits is exclusively over whether or not to include within the scope of Jones Act coverage those persons who, while required to be aboard ship in connection with their employment and arguably advancing in some way the mission of the ship, have no part to play in its transportation/navigation function.

The split of authorities is magnified here, because Wilander would not be covered but for the jury's finding of an employment-related connection with an American vessel, without which Wilander would not have had sufficient American contacts to justify the imposition of American law, including the Jones Act.

The Court has clearly enunciated the circumstances under which American law applies to a maritime transaction. *See, Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953). The Fifth Circuit has distilled the Court's decisions to a determination that the flag of the vessel is the single most determinative factor in deciding which law to apply. *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159, 824 F.2d 972 (5th Cir. 1987), cert. den. 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987) [affirmed other grounds, 868 F.2d 717 (5th Cir. 1989), cert. den. 110 S.Ct. 150, 107 L.Ed.2d 108 (1989)].

Thus, the following is clear: (1) Wilander has a Jones Act cause of action if, and only if, he has a connection with an American vessel; (2) Wilander's connection with that American vessel must be determined in accordance with American law; (3) under the *Robison-Barrett* test, Wilander presented sufficient evidence for the case to go to the jury on seaman status; and (4) under the test of other Circuits, utilizing the "transportation function" analysis, he did not.

Background

Since its adoption in 1920, the Jones Act has provided benefits to members of the crew of a vessel more expansive than those granted under other worker's compensation schemes, including the LHWCA (33 U.S.C. 901, et seq.). Much of the creative tension over differing definitions of status has resulted from the interplay between the Jones Act definition and that of the LHWCA, 33 U.S.C. 903(b)(3), which excludes from the scope of the Act all those who are "members of a crew." Thus, mirror-image precedent can be reviewed.

In *South Chicago Coal & Dock Company v. Bassett*, 104 F.2d 522 (7th Cir. 1939), 309 U.S. 251, 60 S.Ct. 544 (1940), a worker who "performed such additional tasks as throwing the ship's rope in releasing or making the boat fast" but "performed no navigation duties"; "had no duties while the boat was in motion . . . [,] slept at home and boarded off ship" was determined to be covered under the LHWCA rather than the Jones Act (309 U.S., at p. 255; 60 S.Ct., at p. 540). The determinative factor was whether this engine mechanic performed navigational duties:

> [T]he general sense of the word crew is "equivalent to ship's company" . . . in *The Bound Brook, D.C.*, 146 F. 160, 164, it was said that "when the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation. . . . Judge Howe in the *Buena Ventura, D.C.*, 243 F.2d 97, 799, thought that statement was a fair summary, and, in his view, one who served the ship "in her navigation" was a member of the "crew" . . . . *Bassett*, 309 U.S. at p. 259; 60 S.Ct., at p. 548.

Citing many of the same authorities, Justice Douglas four years later expanded the definition by finding a bargeman who lived, ate, and slept on a barge a seaman, even though his duties were those of a laborer. *Norton v. Warner Co.*, 321 U.S. 565, 64 S.Ct. 747 (1944). In so doing, the oft-quoted expansive interpretation of "crew" appears:

> . . . [N]avigation is not limited to "putting over the helm." It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can "hand, reef, and steer." *Norton*, 321 U.S. at p. 572; 64 S.Ct. at p. 751.

As a prelude to *Robison*, the Court in 1957 found a dredge company's employee who lived onshore, but performed such tasks aboard the dredge as making soundings; washing and cleaning navigational lights while the dredge was in transit; but, was injured on land incident to his employment, presented sufficient facts to have a jury determine his status:

> . . . [b]ecause there was testimony introduced . . . tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigational function when the dredge was put in transit. . . . *Senko v. LaCrosse Dredging Corporation*, 352 U.S. 370, 373-4; 77 S.Ct. 415, 417-18.

The Court's *per curiam* decision in *Gianfala v. Texas Company*, 357 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775, relied on *inter alia*, *Bassett, supra; Summerlin v. Massman Construction Company*, 199 F.2d 715 (4th Cir. 1952); *Wilkes v. Mississippi River Sand & Gravel Company*, 202 F.2d 383 (6th

Cir. 1953); and *Gahagan Construction Corporation v. Aramao*, 165 F.2d 301 (1st Cir. 1948). From these citations, and the Court's opinion in *Senko*, which cited the *Gianfala per curiam* opinion, the Fifth Circuit extrapolated its familiar *Robison* test:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips. 266 F.2d 769.

That test did not do away with the requirement that a worker be involved in "navigation;" it merely liberalized the definition of navigation to include all those functions of the vessel performed in maritime commerce.

The "special function" feature of the *Robison* test has been used to extend coverage under the Jones Act to workers not traditionally found within its ambit, and who are by no usual definition of the word a member of a "ship's company" or "crew." However, the twin requirements of permanency and contribution to the special function of the vessel restricted the circumstances to which the expansive definition could be applied. For example, an oilfield worker such as Robison is a "member of the crew" primarily because his job requires him to live, eat, and sleep aboard a structure whose only use

requires it to float on water. A wireline operator, who is at best a visitor to this same facility, but without whose expertise the "special mission" of the oil rig could not be accomplished, is not. Schoenbaum, *Admiralty and Maritime Law* (1987), at pp. 177-180.

The *en banc* decision in *Barrett* concerned itself more with permanency than function, and, thus, *Barrett* is usually cited for the proposition that the substantiality of contacts with a vessel are the determining factor upon which a fact finder can make its determination. *Id.*, at p. 179.

The permanency requirement has restricted a person in essentially the identical fact scenario as Wilander's from seaman status. A painter-foreman who was employed as a ship repairman, sandblasting and painting equipment aboard a semi-submersible drilling rig, who spent 60 percent of his time sandblasting and painting vessels, and who had stayed aboard that semi-submersible rig for seven days prior to his accident, was covered under the ship repairman's provision of the LHWCA, and was not, therefore, a "member of the crew." *New v. Associated Painting Services, Inc.*, 863 F.2d 1205 (5th Cir. 1989). [See also *Nolan v. Coating Specialities, Inc.* 422 F.2d 377 (1970), decided under the *Robison* formula.]

Current Fifth Circuit Cases

The current tension in the Fifth Circuit is highlighted by the comparison of such cases as *Pizzitolo v. Electro-Coal Transfer*, 812 F.2d 977 (5th Cir. 1987), cert. den. 484 U.S. 1059, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), and *LeGros v. Panther Services, Inc.*, 863 F.2d 345 (5th Cir. 1988). *Pizzitolo*

stands for the proposition that a person included within the ambit of coverage under the LHWCA cannot, by definition, be a seaman. In reaching that conclusion, Judge Davis, who wrote the majority opinion in *Barrett*, performed an analysis of the history of Jones Act *versus* LHWCA coverage which is clearly designed to narrow the *Robison-Barrett* test, at least to the extent of excluding, as a matter of first principles, statutorily-defined Longshoremen.

Just a year later, Judge Rubin found a worker on a construction barge, who was assigned to maintain the engines and other equipment, covered as a seaman under the *Robison-Barrett* test, primarily, it seems, because of the permanency of his connection to the vessel in question (e.g., he slept and ate on one of the barges of the fleet most nights; he spent 95 to 97 percent of his time on water rather than on land; and his time on land was spent mostly going from one barge job to another). *LeGros v. Panther Services Group, Inc.*, 963 F.2d 345 (5th Cir. 1988), at pp. 347-8.

In *LeGros*, the analysis was directed first to whether the worker met the test under *Robison-Barrett* and not whether he was a statutorily-defined Longshoreman. In so doing, the Court stated explicitly that *Pizzitolo* was not being overruled or modified; rather, it reaffirmed the connection between "member of a crew of a vessel" as defined in 33 U.S.C. 903(b)(3), and the Jones Act. In dissent, Judge Jones, one of the four members of the *Barrett* panel who had adopted the "aid to navigation" test of *Johnson v. John F. Beasley Construction Corporation*, cited *supra*, said LeGros was "basically a repairman and supervisor" who spent most of his time "inspecting and repairing the vessels on which he was employed." *LeGros*, at p. 354.

The Court then decided to sit *en banc* on the factual questions presented by *LeGros*, and directed counsel as follows:

> In addition to briefing the issues raised by the parties and the panel opinion, the Court instructs that counsel should also discuss whether this Circuit should adopt a navigational-function test of seaman status in addition to or substitution for the *Robison* standard. See, e.g., *Simko v. C&C Marine Maintenance Company* [Citation Omitted]. *LeGros*, at p. 355.

The suggestion that such a navigational-function test should be adopted was not required by the facts of *LeGros*, since, arguably, *Pizzitolo* would command the same result. With the Court having sat *en banc* just two years earlier on the same issue, it is nothing short of extraordinary. The adoption of the navigational-function test, in the context of *LeGros*, is clearly needed to provide a "bright line" rule as a substitute for the nebulous substantiality requirements of *Barrett*. Unfortunately, *LeGros* was settled before the *en banc* panel met to hear argument.

Significantly, Judges Jones and Gee, two of the *Barrett* dissenters, sat on the panel in the instant case. Their conclusion:

> The Supreme Court has not, however, held that our Circuit's test is incorrect and that of the Seventh Circuit correct. Absent such a holding by the Supreme Court, we must adhere to our *en banc* decision in *Barrett*, which reaffirmed the validity of the *Robison* test. 887 F.2d 88, at pp. 90-91.

The Law of Other Circuits

Juries traditionally have a hard time determining "substantiality." There is no better example than the finding of the jury in this case, which connected Wilander to every work station he testified he occupied, with the Court utilizing a standard *Robison* charge.

Navigational function embodies clear-out terminology free from semantic problems. It provides a bright line which edges back Jones Act coverage and, thus, furthers the purposes for which the Act was passed by preserving its validity for those intended to be covered.

Although the Seventh and Third Circuit tests are primarily cited as differences from *Robison*, all the other Circuits, to greater or lesser degrees, use the "navigational function" test in a different fashion.

The Second Circuit holds seamen are only those aboard a vessel "naturally and primarily as an aid to navigation." *Salgado v. M. J. Rudolph Corporation*, 514 F.2d 750 (1975). The Fourth Circuit adds the words "in the broadest sense." *Wittington v. Sewer Construction Company, Inc.*, 541 F.2d 427 (1976). The Sixth is likewise, saying a worker "satisfies the 'in aid of navigation requirement' if his duties contribute to the operation of the vessel." *Peterson v. Chesapeake & Ohio Railway Company*, 784 F.2d 732 (6th Cir. 1986).

The Eighth has cited *Robison* as its test. However, it defines a vessel as "virtually any floating structure used for *transport* in navigable waters." *Slatten v. Martin Keeby Construction Company, Inc.*, 506 F.2d 505 (1974). The Ninth

appears to require association with the navigational function of the vessel in *Worthington v. Icicle Seafoods, Inc.*, 774 F.2d 349 (9th Cir. 1984); however, a California district court opinion demonstrates the difficulty encountered citing *Robison*, but requiring navigational connection (although that issue was not dispositive in the cited case). *Buna v. Pacific Far East Line, Inc.*, 441 F.Supp. 1360 (N.D. Cal. 1977).

CONCLUSION

If *Barrett* was intended to clarify, it has confused. If it was intended to create an additional rule, it has failed. That test stands alone in American jurisprudence to allow a person with tangential connection to a vessel to claim status equal to that of the members of the ship's crew. The conflict in the Circuits is not only between the Fifth and Seventh, it is between the Fifth and everyone else. In this case, other than the fact of Wilander's home residence status in the Western District of Louisiana, there is no rational connection between the Fifth Circuit and the situs of Wilander's accident. Thus, there is no ready reason the Fifth Circuit's test should apply to a determination of Wilander's status, save the location of the litigation within its purview. Clearly, one of the driving factors of *Robison* is absent; oil and gas exploration off the Louisiana and Texas Coasts (*Robison*, at p. 780; *Schoenbaum*, at p. 179).

McDermott International, Inc. would have been amenable to service to a Tennessee resident, for example, alleging injury identical to Wilander's, under circumstances identical to his. If the fortuitous placement of this lawsuit had been in Memphis rather than Lake Charles, Louisiana, Wilander would have failed to meet the test for status.

The effect of inclusion of marginal seamen such as Wilander weakens the effect of the Jones Act for those to whom it is intended to apply:

> While the liberal attitude of courts in finding employees of questionable status "seamen" may be commendable when the employee's duties fall into the gray areas, we believe the purpose of the Jones Act is distorted when persons who are obviously not seamen recover damages at the shipowner's expense. If the Jones Act is to retain any limitations on its coverage, we believe the employee's duties with respect to the transportation function of the vessel should define them. We conclude that *when the person's status as a member of a crew is equivocal*, "the work done by [the] employee will be crucial. . . ." *Johnson*, cited *supra*, citing *Braen v. Pfeifer Transportation Company*, 361 U.S. 129, 131; 80 S.Ct. 247-249; 4 L.Ed.2d 191 (1959). (Emphasis added)

The strength of our admiralty law has been in its uniformity. Where doubt exists, decisions upholding the uniformity of maritime law use that criteria as the supreme decision maker. *See, e.g., Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 905 S.Ct. 1772, 26 L.Ed.2d 339 (1970); *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1916); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986); *Chick Kam*

Choo v. Exxon Corporation, 108 S.Ct. 1684 (1988); *Director, OWCP v. Perini North River Associates, et al*, 103 S.Ct. 634, 459 U.S. 297, 74 L.Ed.2d 465 (1983).

In this most important of maritime tort considerations, there is no uniform American law. The time has come to adopt one, on these facts, in this case. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

VOORHIES & LABBÉ
(A Law Corporation)

JAMES B. DOYLE
700 St. John Street
Lafayette, LA 70501
Phone: (318) 232-9700

Counsel for Petitioner, McDermott International, Inc.

APPENDIX 1

Jon C. WILANDER, Plaintiff-Appellee, Cross-Appellant,

v.

McDERMOTT INTERNATIONAL, INC., Defendant-Appellant, Cross-Appellee.

No. 88-4678.

United States Court of Appeals,
Fifth Circuit.

Oct 30, 1989.

James B. Doyle, Edmund E. Woodley, Woodley, Williams, Fenet, Palmer, Doyle & Norman, Lake Charles, La., for defendant-appellant cross-appellee.

J.B. Jones, Jr., Jennifer J. Bercier, Jones, Jones & Alexander, Cameron, La., for plaintiff-appellee cross-appellant.

Appeals from the United States District Court for the Western District of Louisiana.

Before GEE, GARZA and JONES, Circuit Judges:

GEE, Circuit Judge:

The plaintiff in this action was employed by the defendant, McDermott International, Inc., as a "paint foreman" working in the Middle East. The plaintiff was injured when a plug exploded from a pressurized pipe on board a fixed offshore platform on which he was working.

The plaintiff filed suit against the defendant in the Federal District Court for the Western District of Louisiana, alleging that he was a seaman within the coverage of

the Jones Act and seeking punitive damages. The defendant filed a motion for summary judgment on the issue of the ~~plaintiff~~'s status as a seaman and on his entitlement to punitive damages. The plaintiff filed a motion in opposition to the defendant's motion and filed two supporting affidavits. In the second affidavit the plaintiff stated that during his employment with the defendant he spent approximately 70% of his working time aboard some vessel. The district court denied the defendant's motion for summary judgment on the issue of the plaintiff's status as a seaman, but granted the motion on the issue of punitive damages. The district court then determined that the seaman's status issue would be tried to the jury first, followed by a later trial on liability and damages if necessary.

Following the first part of the trial the jury found that the plaintiff had status as a seaman because he was substantially connected to 1) the DB-9, a Panamanian vessel owned by the defendant; 2) the GATES TIDE, an American vessel chartered to the defendant; 3) the fixed platform upon which he was injured, and 4) a group of vessels called the "TIDEX" fleet. The jury further found that the plaintiff contributed to the function of the DB-9 and the GATES TIDE. The defendant moved for judgment n.o.v., and the court denied this motion. The case proceeded to trial before the same jury on the issues of liability and damages. The jury awarded the plaintiff $450,000, including $400,000 for lost past and future earnings. This amount was reduced by 25% for the plaintiff's contributory negligence. The defendant appealed this judgment, and the plaintiff cross-appealed.

The defendant contends that the district court should have granted the defendant's motion for summary judgment on the issue of the plaintiff's status as a seaman rather than submitting that issue to the jury. In *Barrett v. Chevron, U.S.A. Inc.*, 781 F.2d 1067, 1073 (5th Cir.1986 en banc) we held that a worker qualifies for seaman status under the Jones Act if "the employee . . . [is] assigned permanently to a vessel or perform[s] a substantial part of his work on the vessel." We have stated "that the status determination . . . [is], like any other factual determination, generally to be entrusted to the jury:

> [The terms "seaman," "vessel," and "member of a crew"] have such a wide range of meaning under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts.

Id. at 1072-1073 (citations omitted). "Our cases also make it clear . . . [however] that status may be determined by summary judgment in the appropriate situation. Thus . . . 'where the facts establish *beyond question as a matter of law* [the lack of seaman status] . . . a court . . . may, in the proper case, hold that there is no reasonable evidentiary basis to support a jury's finding that the injured person is a seaman . . . under the Jones Act.' " *Id.* at 1074 (emphasis in original) [citations omitted].

In *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir.1959) we held:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

Id. at 779.

In adopting the second prong of this test, we rejected a stricter proposed test, one which would have limited seaman status to those persons on board a vessel who aid in navigation. *Id.* at 780. Thus, under the *Robison* test, the plaintiff qualifies for seaman status if he is permanently assigned to a vessel *or* performed a substantial part of his work on the vessel *and* the duties he performed contributed to the function of the vessel.

In this case the evidence established that the plaintiff performed a substantial part of his work, directing the sandblasting and painting of fixed platforms, from the GATES TIDE. Further, the GATES TIDE functioned as a paint boat. Consequently, the plaintiff's duties contributed to the function of the vessel. There was, therefore, sufficient evidence under the *Robison* test to support the jury's finding that the plaintiff had status as a seaman.

The defendant urges us to reject the *Robison* test and adopt the more stringent standard set forth by the Seventh Circuit in *Johnson v. John F. Beasley Construction Co.*,

742 F.2d 1054 (7th Cir.1984). In *Barrett v. Chevron, U.S.C., Inc.*, 781 F.2d 1067 (5th Cir.1986 en banc) we were offered a similar opportunity to reject the *Robison* test and adopt the *Johnson* test. Under the *Johnson* test, seaman status is conferred only on employees who "perform significant navigational functions or further the 'transportation function' of the vessel," and under this test it is evident that Wilander would not qualify.[1] *Barrett* at 1073. In declining to adopt this test we noted that "later Supreme Court cases require such a broad definition of 'aid to navigation' that the test proposed . . . is entirely inconsistent with them." *Id.* at 1073. Two justices of the Supreme Court recognize that a conflict exists between our test and that used in the Seventh Circuit. *See Lormand v. Aries Marine Corporation, et al.*, ___U.S.___, 108 S.Ct. 739, 98 L.Ed.2d 774 (1988) dissent by Justice White, denial of certiorari. The Supreme Court has not, however, held that our Circuit's test is incorrect and that of the Seventh Circuit correct. Absent such a holding by the Supreme

---

[1] We note in this connection plaintiff's sworn statement that he aided in the navigation of the vessel and on occasion actually steered or drove the vessel as well as assisted in mooring it. We do not find this statement relevant to whether the plaintiff's duties contributed to the function of the vessel. The plaintiff's duties were to supervise painting and sandblasting of off-shore platforms. The fact that he may, on occasion, have gratuitously assisted in navigation, steering or mooring the vessel does not make these activities a part of his duties. In determining a plaintiff's entitlement to seaman status we consider only those duties which his employer expected him to perform, not those that he chooses to perform for his own edification or amusement or out of the goodness of his heart.

Court, we must adhere to our en banc decision in *Barrett*, which reaffirmed the validity of the *Robison* test. Under that test there was sufficient evidence to support the jury's finding that the plaintiff had status as a seaman.

Finally, we turn to the plaintiff's contention that the jury finding that he was contributorily negligent is supported by insufficient evidence because "the only basis in the evidence for the jury's finding of fault on the part of . . . [the plaintiff] was the first statement of . . . the Indian crewmen who supposedly witnessed the accident." The plaintiff objected to the admission of this statement, apparently taken by the barge captain on his own initiative, on the ground that it was hearsay which fell within no exception to the hearsay rule. The court admitted the statement under Federal Rules of Evidence 803(6) and 803(24)."

These rules provide:

Rule 803. Hearsay Exceptions; Availability Of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records Of Regularly Conducted Activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity, and if it was the regular practice of that business

activity to make the memorandum, report, record, or date compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

. . . .

(24) Other Exceptions.

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

In order to be admissible under (6), the business records exception, the statement, must meet the following foundational elements:

(a) That the document have been made 'at or near' the time of the matters recorded therein; (b) that the document have been prepared by, or

> from information transmitted by a person 'with knowledge of the matters recorded'; (c) that the person or persons who prepared the document have been engaged in preparing it, in some undertaking, enterprise or business which can fairly be termed a 'regularly conducted business activity'; (d) that it have been the 'regular practice' of that business activity to make documents of that nature; and (e) that the documents have been retained and kept in the course of that or some other regularly conducted business activity.

White Industries v. Cessna Aircraft, 611 F.Supp. 1049 (D.C.Mo.1985).

In this case there was no showing that the document was kept in the course of some regularly conducted business activity or that it was the regular practice of the business to make such reports. The statement should not, therefore, have been admitted under subsection (6).

The "last-resort" subsection, number (24), permits the introduction of hearsay statements not admissible under any other if they are trustworthy and if the proponent of the statement informs the adverse party, in advance of trial, that he intends to use them. In this case, two factors made the statement untrustworthy. First, it appears that the statement was prepared in anticipation of litigation. Second, the witness later contradicted his statement. Further, the plaintiff was not given advance notice of the defendant's intent to use the statement. Neither, therefore, should the statement have been admitted under subsection (24).

Contrary to the plaintiff's assertion, however, there was other evidence to support the jury's finding that the

plaintiff was contributorily negligent. The difficulty is that the improperly admitted statement, allegedly made by the only witness to the accident, cannot have failed to have had a substantial impact on the jury. It is impossible to determine whether, absent that statement, the jury would have found the plaintiff contributorily negligent or to what extent. It is apparent that this issue, and the evidence pro and con upon it, is inextricably interwoven with the issue of primary negligence and with damages, so that if this is to be retried, so should they. We therefore AFFIRM the judgment insofar as it determines that Mr. Wilander was entitled to seaman status when injured, REVERSE as to its other determinations, and REMAND for further proceedings consistent herewith. It is so

ORDERED.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

JON C. WILANDER	:	CIVIL ACTION
	:	NO. 84-2014-LC
VS.	:	(Judge Veron)
McDERMOTT INTERNATIONAL, INC.	:	(Filed Aug 5, 1988)

RULING ON MOTION FOR JUDGMENT
ON FINDINGS OF THE JURY

By its motion of July 20, 1988, the defendant, McDermott International, Inc. sought, on the basis of the jury's March 10, 1988 answers to interrogatories, a ruling by the court that the plaintiff Jon C. Wilander's claim has no basis in American law, particularly the Jones Act, 46 U.S.C. §688. The motion was denied on the record and the court now assigns additional reasons.

BACKGROUND

The plaintiff was employed by defendant as a paint foreman in 1983 when he was injured on a fixed platform in the Persian Gulf off the coast of Dubai, allegedly by the negligence of defendant. In a bifurcated trial of the issue of Jones Act seaman's status, the jury returned a verdict in the form of answers to special interrogatories. It found:

(1) That plaintiff was either permanently assigned to, or performed a substantial amount of work aboard, the vessel GATES TIDE;

(2) That plaintiffs' performance of his duties contributed to the function of the GATES TIDE or to the accomplishment of its mission;

(3) That plaintiff was either permanently assigned to, or performed a substantial amount of work aboard, vessels belonging to the TIDEX fleet other than the GATES TIDE;

(4) That plaintiff's performance of his duties did not contribute to the function of the vessels in the TIDEX fleet or to the accomplishment of their mission;

(5) That plaintiff was either permanently assigned to, or performed a substantial amount of work aboard, the barge DB-9;

(6) That plaintiff's performance of his duties contributed to the function of the barge DB-9's regular operation or to the accomplishment of its mission; and

(7) That plaintiff was either permanently assigned to, or performed a substantial amount of work aboard, the fixed platform.

Special Interrogatories to the Jury, Record, document 90, March 10, 1988. The exact text of the interrogatories and their answers are attached as Appendix.

Trial testimony was to the effect that none of the vessels involved were American Flag vessels except the GATES TIDE which did not belong to defendant; that the GATES TIDE was a "paint boat" containing pumps and other equipment integrally used for sandblasting of fixed platforms which work plaintiff supervised; that the plaintiff was quartered aboard the DB-9; and that the DB-9 served as a sort of "mother ship" to the TIDEX fleet for the operations in question. Testimony was also to the effect that plaintiff's injury occurred on a small three-legged fixed platform while the sandblasting support

vessel then being used alongside the platform was the GATES TIDE.

ISSUES RAISED BY PRESENT MOTION

The defendant cites *Herb's Welding, Inc. v. Gray*, 470 U.S. 416 (1985) for the proposition that since the jury has found the plaintiff to have been assigned to a fixed platform, the plaintiff has no Jones Act or maritime negligence action against the defendant employer.

The defendant cites *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447 (5th Cir. 1980) for the proposition that if the plaintiff is a seaman as to the GATES TIDE by reason of that vessel serving as a base of painting operations, then he should be considered a "borrowed employee" of Tidex and any Jones Act claims would be against those vessels and their owners.

Finally, the defendant cites *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159 (5th Cir. 1987) for the proposition that since plaintiff was injured in a foreign place and was a seaman as to the DB-9, a foreign flag vessel, American law does not apply.

ANALYSIS AND CONCLUSIONS

The first argument of defendant relies on a mischaracterization of the jury verdict and on a *non sequitur*. On page two of its motion the defendant states that "the jury has decided [that plaintiff was] permanently assigned to a fixed platform." In fact, the seventh interrogatory was phrased in the disjunctive, so that the finding could equally be that the plaintiff "performed a

substantial amount of work" on a fixed platform. The latter alternative is better supported by the testimony. To the extent that the court may properly draw inferences from a jury verdict, the inference must be drawn which reasonably supports the verdict's validity. It does not follow from the jury's answer to interrogatory No. 7 that plaintiff could not also be a seaman. The rule of *Herb's Welding, Inc. v. Gray, supra*, is that an employee assigned to work on a fixed platform is not, for that reason alone, a seaman.

The defendant's second argument apparently holds that only an employer who is owner of the vessel as to which the employee is a seaman can have Jones Act liability. That is not the law. The Jones Act cause of action is for the employer's own negligence which causes injury to employees who are seamen. The injury need not occur aboard any vessel, but simply must occur while the employee is acting within the course and scope of his or her employment. *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129 (1959); *Guidry v. South Louisiana Contractors, Inc., supra*. Nor is it necessary that the vessel giving rise to seaman status belong to the employer. *Guidry*, 614 F.2d at 452. Moreover, even if a "borrowed employee" instruction had been requested and given, and plaintiff were found to be such as to Tidex, that does not preclude Jones Act liability of the payroll employer. *Id*.

Schexnider v. McDermott International, Inc., supra does not hold that American law cannot apply to a claim by an American who is a seaman as to an American-flag vessel but who is also "permanently assigned" to living quarters or who has "substantial" duties aboard a foreign-flag vessel. The Court does, however, have serious questions whether Jones Act seaman status is available to

an employee who is permanently assigned to or performs substantial work on *all* of (1) an American-flag vessel not owned by his employer, (2) a fleet of foreign-flag vessels not owned by his employer, (3) a foreign-flag vessel owned by his employer and (4) a foreign fixed platform.

The problem is twofold. One aspect goes to the choice-of-law factors of *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines, Ltd. v. Phoditis*, 398 U.S. 306 (1970), as glossed by *Schexnider v. McDermott International, Inc., supra*. Of particular significance in *Schexnider* was that the plaintiff there was allegedly injured aboard an Australian vessel, which was the only vessel connected with the case. *See, Schexnider*, 817 F.2d 1162. The court of appeals emphasized that "[t]he law of the flag is given *great* weight in determining the law to be applied in maritime cases." *Id.* (emphasis in original). In the present case the injury occurred on the foreign fixed platform, but there was sufficient evidence from which the jury could find that Mr. Wilander was acting in the service of the nearby American-flag GATES TIDE at the time.

The more troubling aspect of the problem is whether, given all of the jury's findings, the "substantial work" prong of the *Robison* test for seaman status could reasonably have been found satisfied as to the GATES TIDE. *See Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1073 (5th Cir. 1986); *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959).

In *Barrett* the Fifth Circuit reaffirmed the *Robison* two-prong test, that for Jones Act seaman status the plaintiff was (1) permanently assigned to, or performed a substantial portion of his work on the vessel, and (2) contributed

to the function of the vessel or to the accomplishment of its mission. *Barrett*, 781 F.2d at 1073. The jury interrogatories herein are phrased in these terms, and *Barrett* emphasized that "the status determination . . . is an inherently factual question." 781 F.2d at 1074.

Where as here, "the employee's regularly assigned duties require him to divide his time between vessel and land (or platform) his status as a crew member is determined 'in the context of his entire employment' with his current employer." *Barrett* at 1075; *quoting, Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 (5th Cir. 1980). Without benefit of a transcript the court cannot asses the sufficiency of the evidence in this regard, and consequently cannot now second guess its contemporaneous decision to proceed to the Jones Act damages phase of the trial. Reasons given at the time were that the case is four years old, needing to be concluded, and that it was better to finish the case so that the entire case could be before the court of appeals. If the defendant's motion had been granted, the appeal would have gone up immediately and if the court of appeals reversed, a whole year could pass before retrial. Based on the teachings of the Fifth Circuit, it is this court's inclination to resolve doubt in favor of completeness of the record on appeal, and this policy weighed in favor of denying the motion.

The same policy prompted this court to favor the record with these additional reasons voicing its concerns over Jones Act status, since *Barrett* finds "twenty to thirty percent of [an employee's] work on vessels" insufficient for seaman status, 781 F.2d at 1076, but cites for such considerations the *Longmire* case, in which fifteen percent of time spent on vessels was found insufficient primarily

because of the incidental or make-work nature of the vessel chores involved, see 610 F2d at 1346-47. Where less than half of an employee's duties are performed on vessels or in furtherance of their mission, but such vessel tasks are *not* incidental or make-work, neither *Barrett* nor *Longmire* provide guidance other than the requirement of "substantiality." 781 F.2d at 1076. As stated above, the issue is one best suited to resolution by the court of appeals on a complete record. Accordingly, the defendant's motion has been DENIED.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 5th day of August, 1988.

/s/ Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT JUDGE

COPY SENT
DATE 8-5-88
BY ln
TO: Doyle/Woodley
Bercier/Jones/Bercier

APPENDIX

SPECIAL INTERROGATORIES TO THE JURY

PLEASE ANSWER THE FOLLOWING QUESTIONS. AS IS APPARENT FROM THE INSTRUCTIONS INCLUDED WITHIN THE INDIVIDUAL QUESTIONS, YOU *MUST* ANSWER THE QUESTIONS NUMBERED 1, 3, 5 and 7. YOU *MAY* FURTHER ANSWER QUESTIONS 2, 4 and 6 DEPENDING UPON YOUR RESPONSES TO QUESTIONS 1, 3 and 5.

1. Do you find from a preponderance of the evidence that Mr. Wilander was either permanently assigned

to, or performed a substantial amount of work aboard, the vessel, GATES TIDE?

Answer Yes or No Yes

2. If your answer to question number 1 is "No" please proceed to question number 3. If you answered "Yes" to question 1, please answer the following question: Do you find from a preponderance of the evidence that the duties which Mr. Wilander performed contributed to the function of the GATES TIDE's regular operation or to the accomplishment of its mission?

Answer Yes or No Yes

3. Do you find from a preponderance of the evidence that Mr. Wilander was either permanently assigned to, or performed a substantial amount of work aboard vessels belonging to the TIDEX fleet other than the GATES TIDE?

Answer Yes or No Yes

4. If your answer to question number 3 is "No" please proceed to question number 5. If you answered "Yes" to question number 3 please answer the following question: Do you find from a preponderance of the evidence that the duties which Mr. Wilander performed contributed to the function of the vessels in the TIDEX fleet or to the accomplishment of their mission?

Answer Yes or No No

5. Do you find from a preponderance of the evidence that Mr. Wilander was either permanently assigned to, or performed a substantial amount of work aboard, the barge DB-9?

Answer Yes or No Yes

6. If your answer to question number 5 is "No" please proceed to question number 7. If you answered "Yes" to question 5, please answer the following question: Do you find from a preponderance of the evidence

that the duties which Mr. Wilander performed contributed to the function of the barge DB-9's regular operation or to the accomplishment of its mission?

Answer Yes or No Yes

7. Do you find from a preponderance of the evidence that Mr. Wilander was either permanently assigned to, or performed a substantial amount of work aboard, the fixed platform?

Answer Yes or No Yes

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

JON C. WILANDER	:	CIVIL ACTION
	:	NO. 84-2014-LC
VS.	:	(Judge Veron)
McDERMOTT INTERNATIONAL, INC.	:	(Filed Aug 31, 1988)

RULING ON DEFENDANT'S MOTION FOR
JUDGMENT NOTWITHSTANDING THE VERDICT

McDermott International, Inc., defendant in the captioned matter, has moved under Fed. R. Civ. Proc. 50(b) for judgment notwithstanding the verdict on the issues of Jones Act status, liability, and alternatively on the award of lost earnings on the grounds that the jury verdict, in these respects, is not supported by substantial evidence. The standard of *Boeing Company v. Shipman*, 411 F.2d 365 (5th Cir. 1969) applies to these issues. As for Jones Act negligence, the plaintiff seaman enjoys a featherweight burden of proof, see *Thornton v. Gulf Fleet Marine Corp., Inc.*, 752 F.2d 1074 (5th Cir. 1985).

In order to grant judgment n.o.v. the court must find that "the facts and inferences point so strongly and overwhelmingly in favor of a moving party that reasonable persons could not arrive at a contrary verdict." *Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89, 94 (5th Cir. 1985), *citing Boeing Co. v. Shipman, supra*. The guarantee of the seventh amendment requires that the court be cautious to validate the jury verdict "if at all possible." *Nichols Construction Corp. v. Cessna Aircraft Co.*,

808 F.2d 340, 346 n. 13 (5th Cir. 1985), *quoting, Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

Status and Choice of Law

The court has reviewed the transcripts in evidence and concludes that there is a sufficient basis for the jury to find that in the context of the entire term of his employment as a paint supervisor with McDermott International, Inc., Mr. Wilander was performing substantial work aboard the GATES TIDE and that his duties contributed to the mission of that vessel. In addition to the plaintiff being an American Citizen, the fact that the GATES TIDE is an American flag vessel indicates the choice of American law. *See, Schexnider v. McDermott International, Inc.*, 817 F.2d 1159, 1162 (5th Cir. 1987) (flag of vessel to be given great weight).

Negligence

Under the Jones Act, the jury need only have found that the slightest negligence of the defendant was causative of Mr. Wilander's injuries. *E.g., Spinks v. Chevron Oil Co.*, 507 F.2d 216, 233 (5th Cir. 1975). As there was more than a scintilla of evidence in plaintiff's favor on this issue, the verdict was properly within the jury's discretion.

Damages

This court may not infer by the mere fact of the verdict rendered that the jury failed to consider the

economic downturn of the oil industry. The evidence in the record presents a jury question which the jury has resolved. Although it has done so somewhat generously, this court cannot say that the conclusion reached was without a sufficient basis is evidence.

Conclusion

For the reasons stated above, the court determines that the defendant's Motion for Judgment Notwithstanding the verdict should be, and is hereby, DENIED.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 31st day of August, 1988.

/s/ Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT JUDGE

COPY SENT

DATE 8-31-88
BY ln
TO: Doyle/Woodley
Bercier, Jones, Bercier